National Energy Board

Reasons for Decision

Westcoast Energy Inc.

GH-5-94

May 1995

Jurisdiction

National Energy Board

Reasons for Decision

In the Matter of

Westcoast Energy Inc.

Application dated 6 October 1994, as amended,
for the Fort St. John Expansion Project

GH-5-94

May 1995

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Recital and Appearances

IN THE MATTER OF the *National Energy Board Act* (the "Act"); and

IN THE MATTER OF an Application dated 6 October 1994, as amended, by Westcoast Energy Inc. for: a Certificate of Public Convenience and Necessity pursuant to section 52 of the Act authorizing the construction and operation of certain pipeline facilities; an Order pursuant to section 58 of the Act to exempt certain facilities from the provisions of sections 30, 31, 33, and 47 of the Act; and an Order pursuant to section 59 of the Act concerning the toll methodology applicable to the facilities applied for herein.

HEARD at Fort St. John, British Columbia from 6 February to 11 February 1995 and at Vancouver from 20 February to 24 February, 27 February to 2 March and 7 March to 10 March 1995 (all dates inclusive).

BEFORE:

A. Côté-Verhaaf	Presiding Member
K. W. Vollman	Member
R. Illing	Member

APPEARANCES:

J. Lutes R. Sirett	Westcoast Energy Inc.
R. Dickson	British Columbia and Yukon Territories Building and Construction Trades Council International Brotherhood of Electrical Workers (Local 213)
C. D'Silva	B.C. Health Services Ltd.
B. Rogers	B.C. Provincial Council of Carpenters
C. McCool	B.C. Old Age Pensioners' Organization B.C. Branch of the Consumers' Association of Canada Council of Senior Citizens' Organizations Federated Anti-Poverty Groups of British Columbia Senior Citizens' Association of B.C. West End Seniors' Network
W. Sawchuk	Chetwynd Environmental Society
D. Bursey	Council of Forest Industries Methanex Corporation Cominco Ltd.

F. Weisberg	Export Users Group IGI Resources Inc. Intermountain Gas Company Northwest Natural Gas Company Washington Natural Gas Company The Washington Water Power Company Cascade Natural Gas Corporation
S. Hartnell	Peace Country Environmental Protection Association
A. Johnstone	Northern Environmental Patriots
R. O'Brien	United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Local 170)
A. S. Hollingworth	Aitken Creek Group ATCOR Ltd. B.C. Star Partners Blue Range Resource Corporation Canadian Natural Resources Limited Chauvco Resources Ltd. Conwest Exploration Company Limited Murphy Oil Company Ltd. Norcen Energy Resources Limited North Canadian Marketing Inc. North Canadian Oils Limited Petro-Canada Phillips Petroleum Resources, Ltd. Suncor Inc. Talisman Energy Inc. Tarragon Oil and Gas Limited Texaco Canada Petroleum Inc. Union Pacific Resources Inc. Wainoco Oil Corporation
C. B. Johnson S. Martin S. Richards	BC Gas Utility Ltd.
R. Beattie	CanWest Gas Supply Inc.
S. R. Miller	Petro-Canada
D. A. Holgate	Amoco Canada Petroleum Company Ltd.
R. Moore	Imperial Oil Resources
B. Woods	Mobil Oil Canada

C. Hart	Pan-Canadian Petroleum Limited
R. Vandergrift	Phillips Petroleum Resources, Ltd.
F. Basham	Talisman Energy Inc.
G. Hardcastle	Unocal Canada Limited
P. McCunn-Miller	Alberta Department of Energy
D. Sanderson J. Pelrine	Province of British Columbia
J. Yardley	Peace River Regional District
B. de Jonge J. Hanebury	Board Counsel

Chapter 1

Introduction

On 6 October 1994, Westcoast Energy Inc. ("Westcoast") applied to the National Energy Board ("the Board") pursuant to Parts III and IV of the *National Energy Board Act* (the "Act") for:

(a) a certificate of public convenience and necessity pursuant to section 52 of the Act, authorizing Westcoast to construct and operate certain pipeline facilities (the 457 mm Milligan-Peejay Loop Pipeline and the 406.4 mm Umbach Loop Pipeline);

(b) an order pursuant to section 58 of the Act, exempting certain gas processing and sulphur recovery facilities (the new Aitken Creek Plant), additional compressor facilities and certain additional pipeline and related facilities from the provisions of sections 30, 31, 33 and 47 of the Act; and

(c) an order pursuant to section 59 of the Act confirming that the tolls for services to be provided through the proposed facilities would be determined on a rolled-in basis.

The proposed facilities would all be located in northeastern British Columbia and may be more particularly described as follows:

- four loops and one extension of existing raw gas transmission pipelines within Westcoast's Fort St. John Raw Gas Transmission System;
- the addition of three new compressor facilities within that raw gas transmission system;
- the new Aitken Creek Plant, which will be connected on the upstream side to the raw gas transmission pipelines in the Fort St. John Raw Gas Transmission System and on the downstream side to Westcoast's main transmission pipeline through an expanded Aitken Creek Pipeline; and
- a loop of the Aitken Creek Pipeline connecting the new Aitken Creek Plant with Westcoast's main transmission pipeline.

On 31 October 1994, the Board issued Hearing Order GH-5-94, directing an oral public hearing in respect of the application. A pre-hearing conference was held at the Board's offices in Calgary on 5 January 1995 to hear submissions with respect to the date and location of the hearing and the issues to be considered. The hearing itself was held in Fort St. John from 6 February to 11 February 1995 and in Vancouver from 20 February to 24 February, 27 February to 2 March and 7 March to 10 March 1995 (all dates inclusive).

Chapter 2

Jurisdictional Issues

On 16 January 1995, BC Gas Utility Ltd. ("BC Gas") gave notice to the Attorney General of Canada and the Attorneys General of each of the provinces, pursuant to section 57 of the *Federal Court Act*, that it intended to put into question the constitutional validity, applicability or effect of the *National Energy Board Act* at the hearing of this application and at another hearing that had been directed in respect of Westcoast's Grizzly Valley Expansion Project (Hearing Order GH-6-94). The legal basis for the constitutional question was set out in this notice as follows:

1. The National Energy Board derives its jurisdiction solely from federal legislation, namely, the *National Energy Board Act.*

2. The basis for federal legislative competence over the subject matter of the *National Energy Board Act* is the combined operation of sections 91(29) and 92(10) of the *Constitution Act, 1867*, under which there is federal competence over inter-provincial pipelines.

3. The natural gas processing plants and the gathering facilities which are the subject of the two applications herein are not part of a federal work or undertaking within the meaning of section 92(10)(a) nor works declared to be for the benefit of Canada under section 92(10)(a) [*sic*] of the *Constitution Act, 1867* and consequently their construction and operation are matters beyond federal legislative competence.

4. If on its proper interpretation the *National Energy Board Act* purports to apply to natural gas processing plants and gathering facilities in the circumstances of the two applications herein and to confer on the National Energy Board the authority to grant the Certificates and the orders requested, then the Act is to that extent constitutionally invalid. Alternatively, the Act is constitutionally inapplicable to such processing plants and gathering facilities.

A more abbreviated notice to the same effect was sent to the Attorney General of Canada and the Attorney General of British Columbia pursuant to section 8 of the *Constitutional Question Act*, R.S.B.C. 1979, c. 63.

The issue of the Board's jurisdiction was not raised at the hearing until final argument. In addition to the issues set out in its notice to the Attorneys General, BC Gas also argued that the definition of "pipeline" in the Act does not include gas processing plants and consequently that the Board would not have jurisdiction over the proposed new Aitken Creek plant even if it did fall within federal jurisdiction.

Chapter 3

Facts

Mr. Sirett, counsel for Westcoast, outlined the relevant jurisdictional facts as follows in argument:

> 1. Westcoast was incorporated by a Special Act of Parliament in 1949. Under section 6(a) of that Act, the Company was authorized to construct and operate interprovincial and international pipelines for the transmission and transportation of gas, including all works relative thereto for use in connection with such pipelines. Geographically, the *Special Act* authorized the construction of pipelines within Alberta and British Columbia, as well as outside Canada. In 1971, Westcoast was continued under the *Canada Corporations Act*, and its objects were amended to authorize the construction and operation of interprovincial and international pipelines within the Yukon and the Northwest Territories, as well as British Columbia and Alberta. . . . Clearly, from its inception, both the works and the undertaking or enterprise of Westcoast authorized by Parliament were interprovincial in scope. Moreover . . . the Westcoast pipeline system was interprovincial in scope from the time it first commenced operations in 1957.
>
> 2. . . . Westcoast's main transmission pipeline extends from the international boundary at Huntingdon, north to Compressor Station No. 2, with lines extending north to the Fort Nelson Processing Plant, southeast to the Pine River Processing Plant and east to the McMahon Processing Plant at Taylor, from where two transmission pipelines extend into Alberta and connect, either directly or through pipeline facilities of Westcoast Alberta, with the NOVA Gas Transmission Inc. pipeline system in Alberta.
>
> 3. In addition, gas produced in Alberta and delivered into the two transmission pipelines within that Province is delivered through the Westcoast system to points in British Columbia and to the international boundary for export to the United States. With the expansion of the Gordondale Compressor Station in 1990, gas is now physically delivered from British Columbia into the NOVA Gas Transmission Inc. pipeline system in Alberta, and can, through other connecting pipelines be delivered to points in Canada east of Alberta and exported to the United States.
>
> 4. Westcoast's raw gas transmission pipelines and gas processing plants are all physically connected to Westcoast's main transmission pipeline. The raw gas received into the raw gas transmission pipelines is transported and processed by Westcoast and delivered into its main transmission pipeline for delivery at points in British Columbia, Alberta and at the international boundary for export to the United States.
>
> 5. Not only the main transmission pipeline, but also the raw gas transmission pipelines are interprovincial in scope. The Fort Nelson Raw Gas Transmission System includes the Beaver River and Pointed Mountain Pipelines which extend from the Fort

> Nelson Processing Plant through the Yukon to the Pointed Mountain Field in the Northwest Territories . . . in 1994, the Board authorized Westcoast to construct and operate the North and South Shekilie Pipelines which, when completed this spring, will connect the North and South Shekilie gas fields in northwestern Alberta to the Fort Nelson Raw Gas transmission System. Raw gas produced from those Alberta gas fields will be transported by Westcoast to Fort Nelson for processing and on-going delivery through Westcoast's main transmission pipeline.

The Board accepts the foregoing summary as an accurate general description of the Westcoast system. Mr. Sirett noted that except for the Sikanni Plant, gas delivered to the gas plants is transported through Westcoast's raw gas transmission pipelines. In the case of the Sikanni Plant, raw gas is delivered to Westcoast at the upstream side of the plant by the producers.

Chapter 4

Views of the Parties

4.1 BC Gas

BC Gas argued that in order for there to be federal jurisdiction over the proposed facilities, they must be part of a federal work or undertaking within s. 92(10)(a) of the *Constitution Act, 1867*. BC Gas submitted that s. 92(10)(a) only applies to works and undertakings involving transportation or communication and that only those aspects of a transportation undertaking which are a necessary part of the transportation activity will fall within federal jurisdiction.

BC Gas argued that the core federal undertaking operated by Westcoast is the interprovincial and international transmission of natural gas; that natural gas processing plants are not part of the transmission of gas but rather are part of the production of marketable products, including sales gas, from raw gas; and that the function of gathering lines is different from the function of mainline transmission. BC Gas submitted that Westcoast does not carry on one indivisible undertaking, but rather conducts several distinct enterprises; and that the expression "the Westcoast system" simply means the facilities owned by Westcoast from time to time. BC Gas argued that if a corporation is engaged in different activities, so that there is more than one undertaking, then jurisdiction over such undertakings may be divided.

BC Gas acknowledged that an otherwise provincial activity may fall under federal jurisdiction if it is vital, essential or integral to a federal undertaking. However BC Gas submitted that Westcoast's gathering and processing facilities are not integral to its mainline transportation activity in the necessary constitutional sense.

Finally, BC Gas submitted that the definition of "pipeline" in s. 2 of the *National Energy Board Act* does not include processing plants, and that as a result the Board would have no jurisdiction over Westcoast's processing plants even if they fell under federal jurisdiction.

4.2 Westcoast

Westcoast argued that its entire system, including the raw gas transmission pipelines, the processing plants and the main transmission pipelines, is itself both a federal work and a federal undertaking. Westcoast submitted that once a transportation undertaking is classified as interprovincial, all of its services, intraprovincial as well as interprovincial, are subject to federal jurisdiction. It is wrong, said Westcoast, to segregate supposedly incidental parts of the undertaking from the essential parts.

Westcoast submitted that the processing plants are an essential part of its transportation operation in its day-to-day functioning. Westcoast argued that there is no basis for severing any part of the system and that the raw gas transmission pipelines and processing plants should not be treated as a separate undertaking, or separate undertakings, from the main transmission pipeline.

Westcoast submitted that the words "and real and personal property and works connected therewith" contained in the definition of "pipeline" in s. 2 of the Act were broad enough to include processing plants.

4.3 Aitken Creek Group

The Aitken Creek Group argued that Westcoast's system is a single, undivided undertaking: an arrangement by which natural gas is transported from the Northwest Territories and Alberta, combined with gas gathered from British Columbia, and processed and transported for domestic British Columbia consumption, as well as for export at Huntingdon. They submitted that Westcoast's gathering and processing facilities are required in order for it to be able to operate its extraprovincial undertaking.

The Aitken Creek Group submitted that it was inappropriate to compare the relative volumes of gas transported within and outside the province. The proper test, they said, was to determine whether Westcoast's extraprovincial operations formed a continuous and regular part of its undertaking.

The Aitken Creek Group argued that even if the transportation, processing and gathering components of the Westcoast system were considered individually, federal jurisdiction would still be supported. They submitted that common management of operations was a factor supporting federal jurisdiction and that it would be difficult to separate the management of the transportation, processing and gathering functions.

The Aitken Creek Group also submitted that it was irrelevant that some facilities had been provincially regulated before Westcoast acquired them, since after these facilities were acquired by Westcoast they were integrated into and operated in common with the entire Westcoast system.

4.4 Province of British Columbia

The British Columbia Ministry of Energy, Mines and Petroleum Resources submitted that the Province of British Columbia should regulate gathering and processing because of the significant influence these activities have on the development of the natural gas resources in the province. Beyond this, however, the Ministry made no submissions on the jurisdictional issue, stating that it was the view of the government of British Columbia that this was a policy matter which should be addressed by the federal and provincial governments.

4.5 Other Intervenors

The other intervenors made no submissions on the jurisdictional issue.

Chapter 5

Views of the Board

The Board has historically exercised jurisdiction over all of Westcoast's operations. The Board's jurisdiction over Westcoast's gathering and processing facilities has never been formally challenged, except with respect to two specific components of the system: the Sukunka fuel gas line, in the GH-4-94 proceeding, and the liquid products stabilization and fractionation facilities at Westcoast's McMahon plant, in the RH-1-92 proceeding. In those cases the Board found that it had jurisdiction over the facilities in question, but it did not expressly consider its jurisdiction over Westcoast's gathering and processing facilities in general. In any case, the Board's exercise of jurisdiction in the past is irrelevant to the question now before it. As stated by Madame Justice Reed, there are no "constitutional squatters' rights": *Alberta Government Telephones* v. *C.R.T.C.* (1984), 15 D.L.R. (4th) 515; [1985] 2 F.C. 472; aff'd S.C.C., [1989] 2 S.C.R. 225.

It appears that the only Canadian cases in which jurisdiction over gathering facilities has been considered are decisions of the Board of Transport Commissioners concerning the gathering system of Westspur Pipe Line Company: *Re Westspur Pipe Line Co. Gathering System* (1957), 76 C.R.T.C 158, and previous cases referred to therein. The Board of Transport Commissioners found that Westspur's gathering system formed part of its interprovincial undertaking and therefore fell under federal jurisdiction. Those cases, of course, depended on their own particular facts.

The development and management of non-renewable resources are matters within the exclusive jurisdiction of the provinces by virtue of s. 92A(1) of the *Constitution Act, 1867*. This provides as follows:

> 92A. (1) In each province, the legislature may exclusively make laws in relation to
>
> (a) exploration for non-renewable natural resources in the province;
>
> (b) development, conservation and management of non-renewable natural resources and forestry resources in the province, including laws in relation to the rate of primary production therefrom; and . . .

With certain exceptions, the provinces also have exclusive jurisdiction over "local works and undertakings" by virtue of s. 92(10) of the *Constitution Act, 1867*. In general, therefore, the provinces have regulatory authority over the development and management of natural gas reserves and related infrastructure such as wells and gathering and processing facilities. It is common ground that if there is federal jurisdiction over the proposed facilities, it must arise as an exception to provincial jurisdiction over local works and undertakings under s. 92(10)(a) of the *Constitution Act, 1867*:

> 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next hereinafter enumerated; that is to say, —
>
> . . .

> 10. Local Works and Undertakings other than such as are of the following Classes:—
>
> (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;

It is clear from the jurisprudence that there are two ways in which this exception may result in the proposed facilities falling under federal jurisdiction. These were described as follows in *Central Western Railway Corp.* v. *United Transportation Union*, [1990] 3 S.C.R. 1112 at 1124 [hereinafter *Central Western*]:

> There are two ways in which Central Western may be found to fall within federal jurisdiction . . . First, it may be seen as an interprovincial railway and therefore come under s. 92(10)(a) as a federal work or undertaking. Second, if the appellant can be properly viewed as integral to an existing work or undertaking it would be subject to federal jurisdiction under s. 92(10)(a). For clarity, I should point out that these two approaches, though not unrelated, are distinct from one another. For the former, the emphasis must be on determining whether the railway is *itself* an interprovincial work or undertaking. Under the latter, however, jurisdiction is dependent upon a finding that regulation of the subject matter in question is integral to a core federal work or undertaking.

It is settled that the interprovincial or international transmission of natural gas by pipeline falls within s. 92(10)(a) and is subject to federal jurisdiction: *Saskatchewan Power Corp.* v. *TransCanada Pipelines Limited*, [1979] 1 S.C.R. 297 [hereinafter *Sask Power* v. *TCPL* (1979)]; *Saskatchewan Power Corp.* v. *TransCanada Pipelines Limited*, [1981] 2 S.C.R. 688; *Campbell-Bennett* v. *Comstock Midwestern*, [1954] S.C.R. 207. BC Gas did not argue that Westcoast's mainline transmission system is not within federal jurisdiction, but contended that its gathering and processing activities are a different kind of business and do not form part of the same undertaking. Westcoast submitted that the gathering, processing and mainline transmission components of its system are interdependent and together constitute one integrated undertaking involving the transmission of gas from fields in northeast British Columbia and adjacent areas in the Northwest Territories and Alberta to markets within and outside British Columbia. As such, said Westcoast, its entire system falls within the first case in *Central Western* and is subject to federal jurisdiction. Westcoast argued that there is no basis for considering the raw gas transmission pipelines and processing plants as a separate undertaking, or separate undertakings, from the main transmission pipeline.

Westcoast cited a number of cases as standing for the proposition that the Courts will not divide an interprovincial undertaking into interprovincial components subject to federal jurisdiction and local components subject to provincial jurisdiction: *Toronto* v. *Bell Telephone Co.*, [1905] A.C. 52 (P.C.); *A.G. Ontario* v. *Winner*, [1954] A.C. 541 (P.C.) [hereinafter *Winner*]; *Ontario* v. *Board of Transport Commissioners*, [1968] S.C.R. 118; and *Sask Power* v. *TCPL* (1979). Westcoast quoted Professor Hogg from his text *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992) at 22-8: "Once an undertaking is classified as interprovincial, all of its services, intraprovincial as well as interprovincial, are subject to federal jurisdiction."

The Board accepts this proposition where there is a single undertaking. However it is clear that not every activity conducted by a company in conjunction with a federal undertaking will necessarily form part of that undertaking: *Canadian Pacific Railway* v. *A.G. British Columbia*, [1950] A.C. 122 [hereinafter *Empress Hotel*]; *Canadian National Railway Company* v. *Nor-Min Supplies Limited*, [1977] 1 S.C.R. 322 [hereinafter *Nor-Min*].

Westcoast submitted that gas processing services are essential to its transportation operation (thereby distinguishing the *Nor-Min* case) and are provided solely for the benefit of shippers (distinguishing the *Empress Hotel* case). In support of its argument that its system constitutes a single undertaking, Westcoast also cited *Township of Flamborough* v. *National Energy Board* (1984), 55 N.R. 95 (F.C.A.), leave to appeal to S.C.C. refused (1984), 58 N.R. 79 [hereinafter *Flamborough*].

In *Flamborough*, as in *Winner* and other cases in which the courts have found a single undertaking, the nature of the local and interprovincial services was the same; in *Flamborough* and *Winner*, for example, the services were transportation. In the Board's view, gas processing and gas transmission are fundamentally different activities or services. Processing is one of the operations that result in the production of residue gas, sulphur and liquids, which are then transported to markets by various means. Gathering is a transportation activity, but in the view of the Board it is related to the production process rather than the mainline transmission activity.

Westcoast's business practices reflect the different services that it offers. Customers can contract for Westcoast's transmission services separately from its gathering and processing services. Gathering, processing and mainline transmission services are tolled separately and there are distinct methodologies for deriving each toll. Westcoast's facilities are operated in a coordinated manner, but in the Board's view this is a universal feature of the natural gas industry and would occur between connected facilities regardless of ownership. Westcoast accepts residue gas from gas processing plants operated by others, which involves a similar degree of coordination and cooperation. Furthermore, producers may own gathering lines that connect with Westcoast gathering lines and the lines feeding into the Sikanni plant are all owned by producers.

Some of the plants now operated by Westcoast were previously owned and operated by others under provincial jurisdiction. Although "a change of corporate control can be significant . . . where it leads to alterations in the operation of the activity in question" (*Central Western* at 1131), there is no evidence that the transfer of ownership and control to Westcoast has made a significant difference in the overall manner of operation of these facilities.

Counsel for the Aitken Creek Group suggested that it would be difficult to separate the management of the transportation, processing and gathering functions. However facilities owned by others tie into Westcoast's facilities and it is apparent that the entire gathering and processing infrastructure that feeds into Westcoast's mainline transmission system includes components that are separately owned and managed. There is ample authority that ownership, by itself, is not determinative of the constitutional issue: *Northern Telecom Limited* v. *Communication Workers of Canada*, [1980] 1 S.C.R. 115 at 134; *Northern Telecom Limited* v. *Communications Workers of Canada*, [1983] 1 S.C.R. 733 at 757; *Alberta Government Telephones* v. *C.R.T.C.*, [1989] 2 S.C.R. 225 at 263.

For these reasons, the Board is of the view that the proposed facilities would not be part of Westcoast's mainline transmission undertaking, with the exception of the proposed loop of the Aitken Creek pipeline that would connect the new Aitken Creek plant with Westcoast's main transmission

line. [The proposed facilities not including the loop of the Aitken Creek pipeline are hereinafter referred to as the "proposed gathering and processing facilities."]

Although the proposed gathering and processing facilities are not part of the mainline transmission undertaking, they may themselves fall under federal jurisdiction if they are part of an undertaking that extends beyond the limits of the province. Westcoast owns and operates three gathering lines that cross provincial or territorial boundaries: the Pointed Mountain line, which passes through the Yukon and into the Northwest Territories; and the North and South Shekilie lines, which cross the British Columbia border into Alberta. These lines connect with Westcoast's Fort Nelson processing plant. These lines no doubt fall under federal jurisdiction as works extending beyond the limits of the province. The Board is of the view that it does not need to decide the extent of federal jurisdiction over facilities associated with these lines for purposes of this application, as in the view of the Board the proposed gathering and processing facilities will in any case not form part of the same undertaking. The proposed facilities will not be connected to these lines or to the Fort Nelson plant except through the mainline transmission system and the proposed facilities will not be operationally or functionally integrated with these lines in any manner.

The *Winner* case suggests that independent operations may be considered to be separate undertakings:

> Their Lordships might, however, accede to the argument if there were evidence that Mr. Winner was engaged in two enterprises, one within the province and the other of a connecting nature. Their Lordships, however, cannot see any evidence of such a dual enterprise. The same buses carried both types of passenger along the same routes; the journeys may have been different, in that one was partly outside the province and the other wholly within, but it was the same undertaking which was engaged in both activities. (at 580)

Presumably if Mr. Winner had carried on a separate bus service completely within the province that was unconnected with the service extending outside the province, the Privy Council would have found that there were two enterprises. Similarly, the Board does not believe that independent gathering and processing operations should be considered to be part of the same undertaking for constitutional purposes merely because they are owned and operated by the same corporation.

The Board is prepared to accept that the proposed gathering and processing facilities may form part of an undertaking that includes the existing gathering and processing facilities in the Fort St. John area. For purposes of this application, it is unnecessary to decide whether the gathering and processing facilities within this area comprise a single undertaking, or whether the gathering and processing activities are separate undertakings. In any case, none of these works or undertakings extend beyond the limits of the province. The Board therefore finds that the proposed gathering and processing facilities will not themselves be a federal work or undertaking, or federal works or undertakings, and that they therefore do not fall within the first case in *Central Western.*

The proposed gathering and processing facilities may still fall under federal jurisdiction under the second case in *Central Western* if they are integral to an existing federal work or undertaking. Whether or not facilities are integral to a federal undertaking is a question of fact: *Dome Petroleum Ltd.* v. *National Energy Board* (1987), 73 N.R. 135 at 139. In this case the proposed facilities, or the Fort St. John gathering and processing system, of which the proposed facilities would be a part, would need to be integral and essential to Westcoast's mainline transmission undertaking in order to fall

under federal jurisdiction. In applying this test, it is irrelevant if the mainline is integral and essential to the proposed facilities: *Re Ontario Energy Board and Consumers' Gas Co.* (1987), 39 D.L.R. (4th) 161 at 166.

The Board is of the view that the proposed gathering and processing facilities, whether considered separately or together with the existing gathering and processing facilities in the Fort St. John area as a single undertaking or possibly two undertakings, are not integral to Westcoast's mainline transmission undertaking in the necessary constitutional sense. Physical connection will not by itself result in federal jurisdiction: ". . . something more than physical connection and a mutually beneficial commercial relationship with a federal work or undertaking is required . . ." (*Central Western*, at 1147). The mainline transmission system is dependent at its upstream end on the gas wells and the gathering and processing infrastructure that feed into it, just as it is dependent on the facilities of local gas distribution companies at its downstream end. Of necessity, the transmission system and the upstream and downstream connecting infrastructures are operated in a coordinated manner, regardless of ownership. In the Board's view, this dependence and coordination is an inevitable feature of the natural gas industry and does not result in the connected facilities being essential and integral in the constitutional sense.

For the foregoing reasons, it is the Board's view that the proposed gathering and processing facilities will not be part of Westcoast's mainline transmission undertaking, nor will they be essential and integral to the mainline transmission undertaking in the constitutional sense. The Board therefore finds that the proposed gathering and processing facilities do not fall within the exception to exclusive provincial jurisdiction set out in s. 92(10)(a) of the *Constitution Act, 1867* and as a result that it does not have jurisdiction over such facilities.

As the Board is of the view that the new Aitken Creek plant would not fall under federal jurisdiction, it is not necessary for it to consider whether the term "pipeline," as used in the Act, could include processing plants.

Chapter 6

Disposition

For the foregoing reasons, this application is dismissed on the basis that the Board does not have jurisdiction over the facilities in respect of which this application was made, except for the proposed loop of the Aitken Creek pipeline that would connect the new Aitken Creek plant with Westcoast's main transmission line. Since this proposed loop will not be needed until the new Aitken Creek plant is built, the Board declines to approve this loop at this time.

This decision is confined to the disposition of the present application and should not be construed as a decision with respect to the Board's jurisdiction over Westcoast's existing gathering and processing facilities. That issue, although related to this decision, was not before this hearing panel.

A. Côté-Verhaaf
Presiding Member

K. W. Vollman
Member

Calgary, Alberta
May 1995

Chapter 7

Dissenting Opinion

I find that I am unable to agree with the decision of my colleagues on the question of jurisdiction.

I agree with the majority that this issue involves a determination of whether the Westcoast system is a single indivisible undertaking or two or more separate undertakings. This is a factual determination which must be made having regard to the nature of the business and the manner in which it is actually conducted by Westcoast. It is not relevant that the business could be conducted in some other manner, or that the industry is organized differently in other jurisdictions. As the Privy Council stated in *A.G. Ontario* v. *Winner*, [1954] A.C. 541 at 581 [hereinafter *Winner*]:

> The question is not what portions of the undertaking can be stripped from it without interfering with the activity altogether; it is rather what is the undertaking which is in fact being carried on. Is there one undertaking . . . or are there two?

I am of the view that the entire Westcoast system is one indivisible undertaking. However for the purpose of analysis, I will consider the gathering and processing activities separately.

Assuming, for this purpose, that Westcoast's gathering system constitutes a separate undertaking, it seems clear to me that it would fall within s. 92(10)(a) of the *Constitution Act, 1867*, as the system extends beyond the limits of British Columbia into Alberta, the Yukon and the Northwest Territories. I think there is a good analogy in this regard with the facts in *Re Ottawa-Carleton Regional Transit Commission* (1984), 4 D.L.R. (4th) 452, 44 O.R. (2d) 560 [hereinafter *Ottawa-Carleton*]. That case considered a bus service operated primarily within the Regional Municipality of Ottawa-Carleton, in Ontario. A few routes crossed the Ottawa River into Hull, Quebec, but these accounted for only 2% to 4% of ridership on the system. The Ontario Court of Appeal held that the entire undertaking fell within s. 92(10)(a) and thus under federal jurisdiction. The Court cited *Winner* as "a complete answer to the submission that the bus routes to Hull could be severed from the operations of OC Transpo" [the name of the transit undertaking].

It was conceded by BC Gas in argument that there would be federal jurisdiction over those particular gathering lines that extend outside the province even if the rest of Westcoast's gathering system were found to fall under provincial jurisdiction. Based on the decision in *Ottawa-Carleton*, it seems to me that it would be incorrect to sever the interprovincial gathering lines from the undertaking as a whole.

It is therefore my conclusion that the gathering component of Westcoast's system falls under federal jurisdiction. No one before us suggested that Westcoast's mainline transmission activities do not fall within s. 92(10)(a). The result, in my view, is that the two components of the Westcoast system which involve transportation—mainline transmission and gathering—both fall under federal jurisdiction and that the Board has jurisdiction over these aspects of Westcoast's system by virtue of the *National Energy Board Act.*

It remains to consider the processing component of Westcoast's system. In *Winner* and other "single undertaking" cases such as *Ottawa-Carleton, Toronto* v. *Bell Telephone Co.*, [1905] A.C. 52 (P.C.), *Ontario* v. *Board of Transport Commissioners*, [1968] S.C.R. 118, and *Township of Flamborough* v. *National Energy Board* (1984), 55 N.R. 95 (F.C.A.), leave to appeal to S.C.C. refused (1984), 58 N.R. 79, the nature of the service being provided within the province and across provincial boundaries was the same. Processing is an activity of a different nature than transportation, and it was argued that it is therefore appropriate for the Board to find that Westcoast's processing activities constitute a separate undertaking.

In *C.P.R.* v. *A.G. of British Columbia*, [1950] A.C. 122 [hereinafter *Empress Hotel*], the Privy Council found that the Empress Hotel, which was owned and operated by the C.P.R., did not form part of the C.P.R.'s railway undertaking and came under provincial jurisdiction. However, this case left open the possibility that a hotel could, in certain circumstances, be part of a railway undertaking:

> It may be that, if the appellant chose to conduct a hotel solely or even principally for the benefit of travellers on its system, that hotel would be part of its railway undertaking. (at 144)

A similar result was reached in *C.N.R.* v. *Nor-Min Supplies*, [1977] 1 S.C.R. 322 [hereinafter *Nor-Min*], in which the Supreme Court of Canada found that a quarry on lands owned by C.N.R. and adjacent to its railway did not form part of its transportation enterprise, even though the output of the quarry was used to provide ballast for the railway. The Court was of the view that the quarry was a convenience to the C.N.R. as a source of supply for railway purposes, but was not "an essential part of the transportation operation in its day-to-day functioning." (at 333) Presumably if the quarry *had* been an essential part of the transportation operation, the result would have been different.

In contrast to the fact situations in the *Empress Hotel* and *Nor-Min* cases, Westcoast's processing services are provided solely for its shippers and are essential to the transmission of gas. Processing is essential to the transmission function because engineering, safety and economic factors make it impractical to transport raw sour gas to markets. The hydrogen sulphide contained in the raw gas requires that pipe, welds and associated equipment have special metallurgical properties in order to resist corrosion, embrittlement and cracking. This adds considerably to the cost of a pipeline transporting raw gas. In addition, hydrogen sulphide is poisonous and therefore the potential consequences of a rupture of a line carrying raw gas are more serious than would be the case for a line carrying residue gas. Since Westcoast's main transmission line eventually passes through populated areas in the southern mainland, the transportation of raw sour gas would create an unacceptable risk to the public.

The raw gas also contains liquids that tend to result in the formation of semi-solid substances known as hydrates. These may result in constrictions or plugging in a pipeline. Furthermore, slugs composed of hydrates can potentially rupture a line when they encounter a restriction or a sharp bend. It is therefore necessary to remove hydrates from the major gathering lines by "pigging" the lines. It would be impractical and more hazardous to do this on the main transmission line.

For these reasons, it is essential that the raw gas be processed before it is introduced into the main transmission line.

The processing plants are also integrated with the gathering system. The location and design of both the plants and the gathering system are interdependent; compared to similar areas in Alberta, Westcoast's gathering system in northeastern British Columbia is more extensive so that processing can be accomplished using a small number of large scale plants. The planning of major capacity expansions invariably involves both processing and gathering capacity, as in the present application.

Some of the factors that are relevant in determining whether the processing plants form part of the pipeline undertaking are illustrated in *Dome Petroleum Ltd.* v. *National Energy Board* (1987), 73 N.R. 135. In that case, the Federal Court of Appeal considered whether certain underground storage caverns that were used to receive products transported through a federally regulated pipeline were part of the pipeline undertaking. The appellant had argued that these storage facilities were a local work and undertaking within provincial jurisdiction. In delivering the judgement of the Court, Mr. Justice Mahoney stated as follows (at 139-140):

> There must be means of taking product from the line if the product in it is to move; without that there can be no transportation . . . The terminalling facilities of a pipeline, whoever provides them and whatever the ultimate destination of shipments, are provided solely for the benefit of shippers on the line. In my opinion, when they are provided by the owner of the transportation undertaking, they are part and parcel of that undertaking. That is the case here. The joint venture's storage caverns are an integral and essential part of its Cochin system.

Similarly, Westcoast's processing plants are essential to the transportation of gas to market; they are provided solely for the benefit of shippers on the system; they are provided by the owner of the transportation undertaking, that is, Westcoast; and, in my view, they are an integral and essential part of the system. As I indicated at the beginning, it is my view that the entire Westcoast system is a single undertaking.

BC Gas argued that the definition of "pipeline" in the *National Energy Board Act* does not include gas processing facilities. This issue depends on whether processing facilities can be included in the meaning of the words "and real and personal property and works connected therewith" in the definition of "pipeline" in s. 2.

BC Gas argued, based primarily on principles of statutory interpretation, that these general words should be interpreted narrowly. BC Gas submitted that the listing of a number of specific items closely related to the defined term, the principles of *ejusdem generis* and implied exclusion, the references to processing in certain sections of the Act but not in others, and the scheme of certain provisions all suggest that Parliament did not intend the Act to apply to gas processing plants.

However the principles of statutory interpretation mentioned by BC Gas must be considered together with another principle of interpretation: that the intention, object or scheme of the Act is relevant in determining the scope of the meaning of words or phrases. The Act governs the construction and operation of pipelines, and matters relating to traffic, tolls and tariffs. If certain gas processing facilities are an integral part of a pipeline undertaking, it would defeat the purpose of the Act to exclude such facilities from the definition of "pipeline." The words "and real and personal property and works connected therewith" could, on their plain meaning, include processing facilities.

The *Empress Hotel* case suggests that a hotel could in certain circumstances fall within the definition of "railway" in the *Railway Act*. That definition is structurally similar to the definition of "pipeline" in the *National Energy Board Act*. The following excerpts from the case are relevant:

> It was argued that the Empress Hotel falls within the scope of this definition of railway and therefore within the scope of the declaration in s. 6(c). In their Lordship's judgement this is not so. The fact that it was thought necessary to specify such things as sidings, stations, railway bridges and tunnels as being included in the definition of "railway" indicates that the word "railway" by itself cannot have been intended to have a very wide signification; and in their Lordships' view there is nothing in the definition to indicate that it was intended to include anything which is not a part of, or used in connection with the operation of, a railway system. (at 147)
>
> . . .
>
> Accordingly, the Empress Hotel could only come within the scope of the definition if it could be regarded as connected with the appellant's railway system or railway undertaking. (at 148)

The last part of this quotation suggests that in certain circumstances a hotel could come within the scope of the definition of railway. In my view, the definition of "pipeline" can and should be interpreted to include processing facilities in order to best give effect to the object of the Act.

For the foregoing reasons, I am of the view that the National Energy Board has jurisdiction over the facilities applied for in this proceeding, and I dissent from the decision of the majority on this issue.

Although not part of the reasons for my decision, I would like to make some observations and comments related to this matter. During the hearing, the Board heard evidence on the historical development of the Westcoast system. It appears that Westcoast did not originally intend to enter into the gas processing sector, but that it took over the construction, ownership and operation of the McMahon plant because the producers involved did not have the financial means to complete the project. In any case, Westcoast became involved in gathering and processing almost from its inception.

While the Board may not have expressly considered the issue of its jurisdiction over Westcoast's gathering and processing activities, it did consider its jurisdiction over the Sukunka fuel gas pipeline and the liquid products stabilization and fractionation facilities at the McMahon plant in the GH-1-94 and RH-1-92 proceedings respectively. It is implicit in those decisions that the Board considered itself to have jurisdiction over Westcoast's gathering and processing facilities. The Board's assumption of jurisdiction over the last 35 years is consistent with the 1957 decision in *Re Westspur Pipe Line Co. Gathering System* (1957), 76 C.R.T.C 158, in which the Board of Transport Commissioners found that it had jurisdiction over Westspur's gathering system. Throughout this time, there has been no suggestion by the federal government that the Board exceeded the jurisdiction given to it by Parliament under the National Energy Board Act. I note also that the Government of British Columbia, although an intervenor in this proceeding, has chosen not to make any submissions on the issue of jurisdiction.

Of course, the fact that the Board has historically exercised jurisdiction over Westcoast's gathering and processing activities without being challenged does not mean that it was correct in so doing or that it

should not now consider this issue. However I do not think that the Board should lightly depart from its past position in circumstances such as these, where investment and development decisions over the years have been made on the basis of the regulatory framework that has evolved. Producers who planned on using the Aitken Creek plant and the related gathering system expansions made exploration and development investments based on the current regulatory regime and it was reasonable for them to expect stability in that regard.

I am also mindful of a comment made by the Canada Labour Relations Board in its decision in *Ottawa-Carleton*, quoted in Mr. Justice Henry's decision at the Divisional Court level, 144 D.L.R. (3d) 581 at 588. The Canada Labour Relations Board said: "When the question of jurisdiction is raised suddenly after a mature industrial relationship has developed within our jurisdiction, and it coincides with a number of complex issues before the board, there is an inherent duty upon the board to find out in what context the matter has arisen."

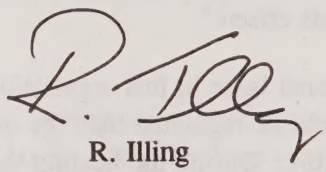
The context of the jurisdictional issue in this application appeared to have more to do with the manner in which these facilities should be regulated than the question of whether the facilities fall under federal or provincial jurisdiction. During the hearing there was a good deal of discussion about the desirability of regulating the tolls for gathering and processing services on Westcoast's system. Such regulation was said to be an anomaly in the industry as fees for gathering and processing are otherwise unregulated. BC Gas and others noted that many aspects of the natural gas industry had been "deregulated" following the Western Accord of 1985 and suggested that the deregulation of Westcoast's gathering and processing facilities was a logical next step in this process. It was suggested to the Board that even if it found that it had jurisdiction, it should exercise "forbearance" and decline to regulate the financial aspects of the proposed facilities.

There seemed to be an assumption that Westcoast's gathering and processing facilities would no longer be subject to financial regulation if the Board were found not to have jurisdiction. This assumption is by no means well founded. It is within the competence of the provincial legislature to regulate tolls and tariffs for gathering and processing facilities which fall under its jurisdiction and the Province might well regulate Westcoast's gathering and processing facilities in the same or in a similar manner as the Board. In fact, in argument the Province expressed support for the rolled-in toll methodology requested by Westcoast for the proposed facilities. Conversely, it is open to the Board to depart from the toll methodology that has historically been used. While the Board set out certain principles with regard to rolled-in tolling in its 1989 decision in the GH-5-89 proceeding, in which it considered an application by TransCanada PipeLines Limited to expand its mainline transmission facilities, the Board might well reach a different result in applying these principles to the particular facts of a case not involving mainline transmission. In my view, the issue of financial regulation is independent from and irrelevant to the jurisdictional question.

When questioned by the Board, counsel for the Province of British Columbia was unable to indicate whether or not the Province would regulate tolls for the proposed facilities if it were found to have jurisdiction. As Westcoast has indicated that approval of rolled-in tolling is necessary to enable this project to proceed, it is reasonable to assume that this project will be postponed for at least an interim period if the Province is found to have jurisdiction. This would retard development of the natural gas resources of northeast British Columbia, with consequential adverse effects for the Province, producers, gas buyers and, of course, Westcoast.

A finding by the Board that it does not have jurisdiction over the proposed facilities will result in similar uncertainty with respect to Westcoast's existing gathering and processing facilities. This will be disruptive to all parties, including producers, shippers and gas buyers, as well as those indirectly involved through the financial and securities markets. Also, if jurisdiction over different parts of the Westcoast system is divided, Westcoast may be required to significantly reorganize its corporate structure. The end result may well be higher transportation and gas processing costs.

A stable and predictable regulatory regime is essential for the orderly development of British Columbia's natural gas reserves. I am of the view that the continued exercise of jurisdiction by the Board is not only correct legally, but in the best interests of all parties.



R. Illing
Member

May 1995